

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

NANCY LEE MIZRAHI and OVADIA
MIZRAHI,

Debtors.

Case No. 92-54703 MM

Chapter 7

DEAN WITTER REYNOLDS, INC.,

Plaintiff,

Adversary No. 92-5043

vs.

MEMORANDUM DECISION

NANCY LEE MIZRAHI and OVADIA
MIZRAHI,

Defendants.

INTRODUCTION

Before the Court is the defendant's Motion for Order Determining Good Faith of Settlement. The hearing on the motion is continued to allow the parties to conduct further discovery.

FACTS

The plaintiff Dean Witter filed a complaint on June 9, 1992 in the San Mateo Superior Court against Nancy Mizrahi, the debtor, Ovadia Mizrahi, who is her estranged spouse and the moving party, Bank of America, Bank of the West, and Home Savings of America. The complaint alleges that Nancy Mizrahi, a former Dean Witter stockbroker, converted a total of \$172,000 from funds in her clients' Dean Witter accounts for personal use, that her spouse was unjustly enriched by her

1 misappropriation of funds, and that Bank of America, Bank of the West, and Home Savings, with
2 which the debtor deposited the forged checks, negligently and in violation of banking regulations,
3 collected and paid forged instruments to facilitate the debtor's misappropriation.

4 This bankruptcy was filed on July 2, 1992. The Superior Court suit was removed to the
5 bankruptcy court. Ovadia Mizrahi filed a counterclaim against Dean Witter asserting that it failed to
6 properly supervise the debtor. The plaintiff also filed a dischargeability action against the defendants.
7 The claims against all of the defendants other than the debtor have been dismissed in the
8 dischargeability action.

9 In a Settlement Conference conducted by the Honorable James Grube on March 12, 1993, all
10 claims between Dean Witter, the debtor and Ovadia Mizrahi were settled. The Settlement
11 Conference was continued until June 11, 1993 to address the plaintiff's claims against Bank of
12 America, Bank of the West, and Home Savings. The Settlement Agreement, which was approved by
13 the Court on April 21, 1993, provides that three separate parcels of property previously owned by the
14 debtor or her spouse shall be sold and the proceeds distributed to Dean Witter, the trustee, Ovadia
15 Mizrahi, and two other creditors. The appraised values of the three properties are not disclosed in
16 the Settlement Agreement. The banks objecting to this motion did not object to the approval of the
17 Settlement Agreement.

18 The Settlement Agreement also provided that the cash proceeds and another property in
19 which the estate had an interest would be confirmed as the sole and separate property of Ovadia
20 Mizrahi. Although the Settlement Agreement discloses the order and the amounts of the initial
21 distributions, it also provides for the distribution of the balance of any funds pursuant to a separate
22 written agreement that is neither attached to the Settlement Agreement nor filed with the Court.

23 Bank of America and Bank of the West, two non-settling co-defendants, object to the debtor's
24 motion on the basis that the Settlement Agreement does not disclose the total amount of the
25 settlement, the factors relevant to a good faith settlement are unsupported by the evidence currently
26 before the Court, the Settlement Agreement provides more to Ovadia Mizrahi than is equitable, and
27 the Settlement Agreement fails to provide adequate consideration to Dean Witter. The banks argue
28 that the disclosures regarding the Settlement Agreement are deficient, and the total amount of the

Ovadia Mizrahi asserts that because the assets of the estate are limited, the focus of the settlement was the distribution of available assets rather than liability issues. He submits that the settlement terms have been sufficiently disclosed and are fair and reasonable.

DISCUSSION

CCP § 877 provides that a release by a good faith settlement of one or more joint tortfeasors subject to mutual contribution rights does not discharge any non-settling co-defendants unless the terms of the release so provide, reduces the claims against the non-settling parties in the amount stipulated by the release or paid pursuant to the settlement, and discharges the settling party from liability to non-settling parties for contribution. CCP § 877. A good faith settlement bars non-settling defendants from seeking contribution from a settling defendant. Arbuthnot v. Relocation Realty Service Corp., 227 Cal. App. 3d 682, 278 Cal. Rptr. 135 (Cal. App.1991). The statutory good-faith requirement, that settling defendant settle in the "ballpark" of its proportional share of comparative liability for the plaintiff's injuries in order to gain immunity from contribution or comparative indemnity, assured that non-settling defendants' liability to plaintiff would be reduced by a sum not grossly disproportionate to the settling defendant's share of liability, thus providing at least some rough measure of fair apportionment of loss between settling and non-settling defendants. Abbott Ford, Inc. v. Superior Court, 43 C. 3d 488, 239 Cal. Rptr. 256 (1987). This is significant because the non-settling defendants' ultimate liability is reduced by the amount stipulated in a release of or in the amount of consideration paid by the settling defendants. Arbuthnot v. Relocation Realty Service Corp., 227 Cal. App. 3d at ____.

The factors relevant to a good faith settlement are set forth in Tech-Bilt, cited by the parties in their briefs. Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 263 (Cal. 1985). One of the purposes of CCP § 877 is to equitably allocate the cost of loss appropriately among joint tortfeasors in proportion to their relative culpability. Tech-Bilt, 38 Cal. 3d at 496, 213 Cal. Rptr. at 260. A defendant's settlement figure must not be grossly disproportionate to what a reasonable person would estimate the defendant's liability to be at the time of the settlement.

1 Tech-Bilt, 38 Cal. 3d at 500, 213 Cal. Rptr. at 263.

2 Conclutory allegations and opinions regarding factors relevant to good faith are insufficient if
3 they are not supported by the facts. Greshko v. County of Los Angeles, 194 Cal. App. 3d 822, 834,
4 239 Cal. Rptr. 846, 893 (Cal. App. 1987). It is clear that the banks, which bear the burden of proof
5 on the issue of good faith, do not have sufficient information to adequately address the factors
6 enunciated in Tech-Bilt.

7 **CONCLUSION**

8 Therefore, the Court will not rule at this time but will continue the hearing to permit the
9 parties to conduct discovery on the relevant factors and to further brief the issues.